INDEX

CITATIONS

Cases:

Statutes:

Statutes—Continued

Miscellaneous:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 33

ORLANDO DELLI PAOLI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinions of the Court of Appeals are reported at 229 F. 2d 319.

Jurisdiction

The judgment of the Court of Appeals was entered January 10, 1956. The petition for a writ of certiorari was filed on February 3, 1956 (No. 664, October Term, 1955), and was granted March 26, 1956 (350 U.S. 992). A motion by petitioner for leave to proceed further *in forma pauperis* was

granted by this Court on May 14, 1956.[1] The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). See also Rules 37(b) (2) and 45(a), Federal Rules of Criminal Procedure.

Questions Presented

Whether the evidence adduced on the trial was sufficient to convict petitioner of the crime of conspiracy to violate the alcohol tax laws and whether the receipt in evidence of the post-conspiracy written confession of a co-defendant as against petitioner was proper.

Statutes Involved

The statutes involved in this case are Title 18, United States Code (1952 ed.), Section 371; Title 26, United States Code (1952 ed.) Sections 2803(a), 2806(e) and 2913. Only Title 18, United States Code, Section 371 is pertinent to this cause and reads as follows:

Conspiracy to commit offense or to defraud the United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the objects of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both. * * * Act of June 25, 1948, c. 645, 62 Stat. 701.

Statement

Petitioner, Orlando Delli Paoli, and four co-defendants, Tony Pierro, Carmine Margiasso, Julius King and James

---

[1] By direction of the Court, the Record on Appeal is not printed and this cause is heard on the typewritten record of the Court of Appeals. All page references are to the pages in the certified typewritten record.

Whitley, were named as defendants in an indictment in three counts, charging the following crimes: Count One: As to all defendants, a conspiracy in violation of Title 18, United States Code, Section 371, to violate the alcohol tax laws; Count Two: As to Margiasso and King, possession of a quantity of illicit alcohol, in violation of Title 26, United States Code, Sections 2803(a), (g); Count Three: Asto Margiasso alone, possession of another quantity of illicit alcohol, in violation of the same statutory provisions as in Count Two.

The conspiracy count in which petitioner Delli Paoli was named alleged a criminal conspiracy to violate the alcohol tax laws commencing on or about December 1, 1949 and continuing thereafter up to the date of the filing of the indictment on November 4, 1953. However, the defendants named in the indictment were apprehended by agents of the Treasury Department, Alcohol and Tobacco Tax Unit, on December 28, 1951, the date of the last overt act pleaded in the indictment, and there is no dispute as to the fact that the conspiracy charged in the indictment terminated on December 28, 1951.

All defendants were convicted of all counts in which they were named on November 26, 1954, in the United States District Court for the Southern District of New York, and received various sentences. Petitioner Delli Paoli was sentenced to a term of two years imprisonment for conspiracy to violate the alcohol tax laws, and he alone appealed the judgment of conviction. On appeal the Court of Appeals for the Second Circuit affirmed the judgment of conviction by a divided court and each of the three judges wrote an opinion. Judge Learned Hand wrote the opinion of the Court; Judge Medina concurred in a separte opinion; and Judge Frank dissented in an opinion.

The evidence in this case discloses that commencing

about December 7, 1949 until December 28, 1951, the date of the arrests, petitioner Delli Paoli and co-defendants Pierro and Margiasso were under surveillance by agents of the Treasury Department, Alcohol and Tobacco Tax Unit.

During December 1949 one Krone, the owner of a house and garage at 1124 Harding Park, in the Bronx, New York, met Pierro in the Tivoli Bar and Grill in the neighborhood and told him that he wanted to sell his home and move (78-83). Pierro and Delli Paoli, both of whom Krone knew from this neighborhood bar (74-75), inspected the property and eventually Pierro's sister, Mrs. Tillie Stasio (113), purchased the property on December 29, 1949 (89, 113). This property was located near the Long Island Sound and often experienced severe weather conditions (101, 117-118); and since the garage had no foundation it sometimes flooded in gale weather (101). Krone himself had built this garage (94) and it was in need of repairs after Pierro's sister purchased the property (100, 102). In the Spring of 1950 Pierro and another man were observed by Government agents to be repairing the garage (33).

On April 10, 1950 Pierro was observed to drive his automobile to Delli Paoli's home at 1155 Croes Avenue, Bronx, New York, where he joined Delli Paoli and together they drove to another place to inspect a green paneled truck (32-33). On April 12, 1950 this truck was observed to be standing in front of 1124 Harding Park (33). On May 1, 1950 the agents observed Pierro drive his automobile to Delli Paoli's home and together they drove to 1124 Harding Park, pick up the truck and then drive it to a gasoline service station where they purchased gasoline for the truck, then drive it back to the Harding Park address (34-35).

During the summer of 1951 a Mrs. DePasquale, who resided at 1124 Harding Park, introduced Delli Paoli to a

neighbor as her cousin (539-540). Delli Paoli was also seen at this address during this summer (552).

A more intensive surveillance of petitioner Delli Paoli and co-defendant Margiasso was commenced by the Government agents on or about October 22, 1951. After several inconclusive observations during November 1951, on December 4, 1951 Delli Paoli was observed to leave his home at 1155 Croes Avenue at about 3 P.M., enter his 1947 Cadillac car and drive to 1124 Harding Park where he put his automobile towards the garage doors and he was then observed to back the vehicle up to the garage doors and open them (143-144). The agent testified that at that precise moment, without observing more, he discontinued his observations and left the vicinity (144).

On December 10, 1951, Delli Paoli and Margiasso were observed to drive from Delli Paoli's home at 1155 Croes Avenue to 1124 Harding Park in the green paneled truck and there take some furniture from the truck and place it in the garage. They then returned the truck to a lot across the street from Delli Paoli's home (147).

On December 18, 1951 Delli Paoli was observed to be at the Bronx River Service Station located at Bruckner Boulevard and Bronx River Avenue in the Bronx, New York.[2] He left there and returned to his home (590-591). Margiasso was observed to arrive at 1124 Harding Park at about 6:30 P.M., to open the garage doors and enter the garage (150). At about 8 P.M. Margiasso drove to the Bruckner Boulevard service station where he entered the office (150). After 8:30 P.M. Delli Paoli left his home, drove to and entered the office of the service station (591). Shortly thereafter two men drove into the service station and entered the office. Margiasso emerged from the office, got into the two men's Pontiac and drove off, returning in about

[2] This service station is one of the important locations in this case.

half an hour (151). The Pontiac's "rear end was down" (401) and it appeared to be "heavily loaded." This vehicle was driven away by the unknown men and nothing more has ever been heard of it, for although the vehicle was followed it was not stopped because there were "icy roads" that night (400).

Meanwhile Delli Paoli was observed to go from the Bruckner Boulevard service station to the Tivoli Bar (594-595). From there he went to another bar, the Lido, where a man removed a large package from his Cadillac car and carried it into the bar (595-596). Later that night both Delli Paoli's and Margiasso's automobiles were observed parked at the Tivoli Bar (597).

On December 28, 1951, the critical date in this case, Government agents were observing the Bruckner Boulevard service station through field glasses from a distance (159). They observed the service station at some time between 7 and 8 P.M. (159). Delli Paoli and Margiasso were seen at the service station office (653). Then Delli Paoli drove off in his vehicle (654). Some time later co-defendant King drove into the service station where he was met by Margiasso (599-601). Margiasso got into King's car and drove off in it (601). While Margiasso was away, Delli Paoli returned and his Cadillac car was placed on the greasing pit by the service station attendant (159-161). King and Delli Paoli then sat first in Margiasso's car and later they went into the office of the service station. After the greasing job was completed and Delli Paoli's car was taken off the rack, both he and King sat in this vehicle until Margiasso returned with King's vehicle (160). During all of this time other persons, who have not been identified or connected with this case, were observed to be at or near the service station, as well as in the office itself (293); and the normal business routine of the service sta-

tion continued. At about 8:30 P.M., Margiasso returned with King's car and King drove off in it (161).

The agents followed King from Bruckner Boulevard and Bronx River Avenue in the Bronx to 7th Avenue and West 146th Street in Manhattan, a distance of approximately six miles of heavily trafficked streets, where they apprehended King and found a quantity of illicit alcohol in his vehicle. King was placed under arrest (161-163). During this time both Delli Paoli and Margiasso had each left the service station and neither was under observation by the agents for several hours.

The agents returned to Bruckner Boulevard and at about 10 P.M. they observed Margiasso return to the service station (409). Co-defendant Whitley arrived in his own car shortly thereafter and Margiasso drove off in Whitley's car, leaving Whitley at the service station (409). The agents followed Margiasso to 1124 Harding Park (410). Margiasso was observed to back Whitley's car up to the garage doors, to open the trunk of the car and then to open the garage doors. He then closed the trunk of the car, left the garage doors open and drove off. The agents stopped Margiasso but found no alcohol in Whitley's car (410-411). Keys found on Margiasso's person fitted the lock on the garage doors of 1124 Harding Park and upon returning to the garage (where the doors were open) a large quantity of illicit alcohol was found in the garage (170-172). Margiasso was placed under arrest and taken back to Bruckner Boulevard. Whitley too was then placed under arrest and he was found to have $1,000 in cash in a brown paper bag on his person (179-180).

At about 11:30 P.M. that night Delli Paoli returned to Bruckner Boulevard and drove into the service station (180). Agent Fay engaged him in conversation and after a few moments Delli Paoli started to back out of the station (180-

181, 414-415). Agent Murphy then drove his car up behind Delli Paoli and blocked his path (415). Meanwhile a police car pulled up to his left (181). Delli Paoli thereupon was arrested.[3]

On January 5, 1952, Whitley, accompanied by his lawyer, went to the officers of the Alcohol and Tobacco Tax Unit in New York City and there he executed a detailed written confession (381-386). This written confession has been appended by Judge Frank to his dissenting opinion, and is reprinted at pages 324-326 of 229 F. 2d. For the convenience of the Court and Counsel, this confession is also reprinted herein as an Appendix to this brief.

During the course of the trial the Government offered in evidence Whitley's written confession (386), which was received over the objection of all defendants, including Whitley (727). The trial judge admonished the jury that this confession was being received only as against Whitley and was not evidence against any other defendant on trial, including petitioner Delli Paoli (727-737). Later on during his charge to the jury, the trial judge again referred to this written confession by Whitley and again advised and instructed the jury that they were to consider this confession only as against Whitley (928-929).

Summary of Argument

From the facts in the case, there is no scintilla of evidence linking petitioner with the conspiracy charged in the indictment. At best, petitioner's conduct was suspicious,

---

[3] The Government has made much argument over this incident, which it characterizes as Delli Paoli's "attempted flight", both in the Court of Appeals and in its brief in opposition to the petition for certiorari in this Court. Significantly, the agent who engaged Delli Paoli in conversation at the service station, Agent Fay, was not called as a witness at the trial and the facts of the transaction between him and Delli Paoli are not in the record.

not criminal. *United States* v. *Carengella*, 198 F. 2d 3, 7 (7th Cir.) The series of observations by Government agents covering two years of isolated and separate instances, none of which were criminal or surreptitious, fails to link petitioner with the conspiracy ultimately proved. Petitioner's presence and association with several of the co-conspirators during the course of the conspiracy is not evidence of guilt. *United States* v. *Di Re*, 332 U.S. 581; *United States* v. *Williams*, 341 U.S. 58, 64, footnote 4. The "drag-net of conspiracy" theory must not be permitted to sweep petitioner within it. *United States* v. *Falcone*, 109 F. 2d 579, affirmed, 311 U.S. 205; see *Krulewitch* v. *United States*, 336 U.S. 440, concurring opinion at pp. 445-458.

The receipt in evidence of the post conspiracy written confession of co-defendant Whitley was improper under the circumstances of the case, notwithstanding the trial judge's admonition and instructions to the jury that this confession was being received and was to be considered only as against Whitley. The fact that this written confession contained details of petitioner's alleged criminal conduct which went before the jury, nevertheless constituted prejudicial error. *Krulewitch* v. *United States*, 336 U.S. 440; *Kotteakos* v. *United States*, 328 U.S. 750, 764-765.

Argument

The trial of this case covered eight trial days. All of the direct evidence was produced by the prosecution, with the defendants offering no direct case, relying solely on cross-examination to establish their defense to the indictment. The evidence introduced consisted principally of the narration of observations and surveillances by Government agents. A few non-agent witnesses were called to testify and these were all neighbors residing in the immediate vicinity of 1024 Harding Park, Bronx, New York. From

all of the evidence introduced the only credible evidence of criminal conduct was the evidence discovered on the night of December 28, 1951. However, in order to lay a foundation for the maximum exploitation of this evidence and thereby to invest this case with the sense of it being a long-range criminal undertaking, the prosecution has relied upon a psychological device of "relation back." Thus, the discoveries of the final night result in the earlier observed events being called criminal *ab initio*. By this technique the prosecution created on this trial an atmosphere of criminal conspiracy, to be imputed to every observed incident or transaction commencing with December 1949, through the events of December 28, 1951. The chronological narration of these observations by the Government agents has each of these events transformed into a sinister act, confirmed as such by the events of the final night.

In other words, every act, deed, meeting, conversation or transaction from December 1949, until the night of December 28, 1951, becomes characterized as a link in the chain of conspiratorial conduct, with proof of the fact that it was criminal conduct derived solely from subsequent events. This is done without regard to the actual innocence of petitioner, or to the fact that all of his activities were freely open and obviously remote to any criminal conduct subsequently discovered.

A criminal enterprise having been discovered on December 28, 1951, everything which went before is deemed, imputed or argued to be originally part of the criminal enterprise, to be criminal conduct, even though there was no *evidence* introduced on the trial to substantiate the characterization of these prior acts as criminal. It is then argued that the totality of these facts, including the events of December 28, 1951, are sufficient to establish a criminal conspiracy from December 1949 involving this petitioner by *circumstantial evidence*.

This in substance is the logical analysis of the case against petitioner, for no scintilla of direct proof was introduced linking him to the illicit alsohol discovered on the final night. No really circumstantial evidence was introduced warranting the inference that petitioner was engaged in the criminal enterprise of the co-defendants, to the exclusion of every reasonable hypothesis of innocence. When the facts of the case which allegedly implicate petitioner are examined under this analysis their value as evidence disappears and the full importance of the need by the prosecution to use Whitley's post-conspiracy written confession against petitioner becomes apparent. The great harm done petitioner by the use of this confession is obvious; it is the only substantial document linking him to this case.

One further general observation is appropriate here. Petitioner was named only in the conspiracy count of this indictment; he was specifically excluded from the substantive counts against Margiasso and King. If petitioner's participation in the conspiracy was as substantial as the Government contends, then it should follow that his presence at the Bruckner Boulevard service station on December 28, 1951, both with Margiasso and King, is evidence of aiding and abetting,[4] with the same proof required to establish the conspiracy sufficient to sustain a conviction against him for the substantive offenses.[5]

But petitioner was not named in the substantive counts. The proof of the transactions of December 28, 1951 shows only that he was present at the service station. No further participation in any criminal activity is alleged or proved against him.

---

[4] Title 18, United States Code, Section 2.

[5] *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-620; *Pinkerton* v. *United States*, 328 U.S. 640.

Thus, the posture of the case becomes this: For all of the observations of petitioner for the times prior to December 28, 1951, no conspiratorial conduct is shown; for the events of December 28, 1951, he is shown only to be present at the scene of some non-secretive criminal transactions, with the Government charging him only with conspiracy for the events of that evening, and not with aiding and abetting the substantive crimes committed at that time.

Judge Learned Hand writing the Court's opinion below treated petitioner's connection with the conspiracy as follows:

> "The whole business was illegal and carried on surreptitiously; and the possibility that unless he (Delli Paoli) were a party to the venture, Pierro and Margiasso would have associated with him to the extent we have mentioned is too remote for serious discussion." (229 F. 2d 319, 320)

In dissenting, Judge Frank's statement in this regard is: "Most of this evidence consists of testimony which, if believed, shows that he (Delli Paoli) fraternized with the other defendants." (229 F. 2d 319, 322).

I

There Was No Credible Evidence Linking Petitioner to the Conspiracy Herein.

Petitioner's "association" or "fraternization" with the conspirators in this case is not evidence of his criminal conduct. Giving the proof presented by the Government witnesses the aspect most favorable to the Government, the best that could be said for the case against petitioner is that his conduct was "suspicious". Suspicious conduct is not criminal conduct and this conviction founded on sus-

picions, rather than legal proof of petitioner's participation in the conspiracy, cannot stand.

The proper treatment to be made of suspicious conduct only was made in the case of *United States* v. *Carengella*, 198 F. 2d 3, 7, where the Court of Appeals for the Seventh Circuit, held as follows:

> "Tenerelli's further testimony that Blandi made inquiry as to police inquiries was not binding upon Di Vito or Carengella who were not present. As to Blandi, it does no more than arouse the suspicion that he had a guilty conscience about something, but it takes something more than a robust suspicion to convict a defendant in a criminal case. United States v. Wainer, 7 Cir., 170 F. 2d 603, 606.
>
> Association with guilty men may create suspicion, but it is not evidence of sufficient weight to convict under the statute in question. United States v. O'Brien, 7 Cir. 174 F. 2d 341, 345. We think the judgments against Di Vito and Blandi must be reversed."

Petitioner and the co-defendants Pierro and Margiasso were obviously good friends. It is from the knowledge of their friendship that the inference is sought to be drawn that they must necessarily have been engaged together in a criminal conspiracy. To support this inference every transaction or incident in which they were observed together is characterized as evidence of participation in the criminal enterprise, no matter how remote or unrelated to subsequent events these incidents may have been. Thus is the doctrine of "guilt by association" carried to its extreme application against this petitioner.

In the case of *United States* v. *Di Re*, 332 U. S. 581, this Court set forth the rule that the presence of a defendant with criminal offenders is not evidence of complicity au-

thorizing criminal conviction. In that case, Di Re was convicted of knowingly possessing counterfeit gasoline ration coupons which were discovered on his person when he was arrested with other offenders. The case turns on whether the arrest and bodily search of Di Re were justified by the fact of his presence only with the other offenders, as to whom an informer had given information of criminal activity to the federal authorities. The Court of Appeals for the Second Circuit reversed Di Re's conviction and held that both his arrest and the search of his person were violative of the Fourth Amendment of the Constitution, since there were not reasonable grounds for the arrest and the search of his person incident to such arrest.[6] The majority opinion of the Court of Appeals reiterated the prior holding of that Court that a defendant's mere association and presence with wrongdoers is not sufficient to sustain a conviction for aiding and abetting or conspiracy.[7] This Court thereupon affirmed the holding of the Court of Appeals, stating on this point:

> "An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial

[6] 159 F. 2d 818, *per* Learned Hand, Ch. J., Clark, C.J., dissenting.
[7] *United States* v. *Peoni* (2d Cir.), 100 F. 2d 401, 402.

to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings." (332 U. S. 581, 593).

The *Di Re* holding was approved by this Court in *United States* v. *Williams*, 341 U. S. 58, 64, footnote 4; See also *Hicks* v. *United States*, 150 U. S. 442. In the *Carengella* case, *supra*, 198 F. 2d 3, 7, the rule is stated as follows:

> "One is guilty as an aider and abettor when he consciously shares in any criminal act. Nye and Nissen v. United States, 336 U. S. 613, 619, 69 S. Ct. 766, 93 L.Ed. 919; United States v. Johnson, 319 U. S. 503, 518, 63 S.Ct. 1233, 87 L.Ed. 1546. The rule is expressed in the case of United States v. Williams, 341 U. S. 58, 64, 71 S. Ct. 595, 599, 95 L. Ed. 747, in this language: 'Aiding and abetting means to assist the perpetrator of the crime. * * * To be present at a crime is not evidence of guilt as an aider or abettor. Hicks v. United States, 150 U. S. 442, 447, 450, 14 S. Ct. 144, 145, 147, 37 L.Ed. 1137. Cf. United States v. Di Re, 332 U. S. 581, 587, 68 S. Ct., 222, 225, 92 L. Ed. 210' "

By comparison with the facts in this case, it would appear that the *Di Re* case was much stronger for the Government's point of view. In *Di Re*, the defendant was seated between two main offenders in the automobile where the counterfeit ration coupons were passed; more than one hundred inventory gasoline ration coupons were found on his person in an envelope concealed between his shirt and underwear. His presence in the automobile, if we apply the Government's theory of conduct "criminal *ab initio*", was surely that of an aider and abettor or a co-conspirator. In this case, at no time was Delli Paoli found in the possession of or in the vicinity of illicit alcohol (except perhaps when Margiasso delivered to King his vehicle loaded with

illicit alcohol at the public service station), or in any secretive or hideout situation. All of the observations of Delli Paoli disclose that he engaged in normal routine open non-criminal conduct. An imputation of criminality to his every movement is required to sustain the present conviction; such imputation is unjustified by the record in this case.

On those occasions when the agents were intensifying their surveillance of Delli Paoli and the others, still no evidence of criminal conduct was discovered. On one occasion (December 4, 1951) during broad daylight, the agent Silvers observed Delli Paoli drive to 1124 Harding Park, back his automobile up to the garage doors and open them (143-144). Silvers then testified that at that precise moment, without observing more, he discontinued his observations and left the vicinity (144). The Government contends that this garage was the "drop" for illicit alcohol, and yet on this occasion no illicit alcohol or paraphernalia for the traffic of illicit alcohol was observed. Further, on the last occasion Delli Paoli was observed at the garage, on December 10, 1951, he was observed only to deliver some furniture in a truck and place it in the garage (147). At no time until December 28, 1951 was illicit alcohol connected with this garage. After December 10, 1951, Delli Paoli was not again connected with the garage. A period of eighteen days elapsed until December 28, 1951 when the illicit alcohol was discovered hidden in the garage, with Margiasso in possession of the keys to the garage door lock.

On December 28, 1951, Delli Paoli was observed at the Bruckner Boulevard service station. His presence there, as well as the presence of a great many other persons (293) at this public service station was not secretive or surreptitious. He conversed with King, with whom Margiasso had criminal dealings, while his automobile was being serviced on the greasing rack (159-161). The sinister cast of criminality applied to Delli Paoli's talking with King de-

velops only from King's subsequent apprehension that night with a quantity of illicit alcohol found in his automobile (163).

Finally, Delli Paoli is charged with attempting to flee from arrest that same night when, after several hours away, he returned to the service station (180). In the Court of Appeals, this evidence of attempted flight was characterized by Judge Frank as "not very strong"[8]; Judges Hand and Medina ignored the Government's argument on this point. Nevertheless, the Government has repeated the argument that there is evidence of attempted flight by Delli Paoli in this case, which attempted flight may be considered as evidence of consciousness of guilt. The facts of the situation as to Delli Paoli's return to the service station at about 11:30 p. m. that night, his conversation with Agent Fay (as to the details of which there is no testimony except Agent Silvers' characterization that there appeared to be "some sort of argument going on between the two of them" (180)), and his starting to back his automobile out of the service station when he was apprehended, are clear in the record (180-181, 414-415). These facts do not support an inference of attempted flight. There is no testimony in this record that Delli Paoli was placed under arrest, or was attempted to be placed under arrest, and thereafter sought to flee. The record is barren of any testimony that Delli Paoli knew or had reason to believe that he was being arrested and thereafter he attempted to flee. As a matter of fact, Agent Murphy testified that it was after his apprehension that Delli Paoli was placed under arrest (415). Unquestionably, there is no evidence of flight in this case.

It is strange that the Government should argue that this petitioner attempted to flee from arrest in this case where

---

[8] See footnote 1 at p. 322 of 229 F. 2d.

the only charge later made against him was conspiracy; he concededly committed no substantive criminal offense, either that night or any other night. His alleged offense did not involve any public disturbance; and there is no evidence that he was advised he was under arrest prior to his alleged attempted flight. Had this petitioner not engaged in an "argument" with Agent Fay and had not sought to leave the scene of events, the argument would probably be advanced by the Government that his acquiescence in his arrest and his failure to protest his innocence would be evidence of his guilt, as was contended in the *Di Re* case, 332 U. S. 581, 594-595. Of course, this Court rejected the "acquiescence" argument in the *Di Re* case; it should reject the "attempted flight" argument in this case.

On principle this Court should reject once again the "drag-net of conspiracy" theory which typifies this case. Judge Learned Hand expressed the concept most clearly in his opinion in *United States* v. *Falcone*, 109 F. 2d 579, 581:

> "So many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

This Court affirmed the *Falcone* decision at 311 U. S. 205. See also *United States* v. *Andolshek*, 142 F. 2d 503, 507.

The late Mr. Justice Jackson in his famous concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 445, expressed the fear felt by that enlightened jurist of the indiscriminate use of the conspiracy indictment:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggest that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." (336 U.S. 440, 445-446).

Instead of a more discriminating use being made of the conspiracy indictment since the decision of the *Krulewitch* case in 1949, it appears that the conspiracy indictment concept is continuing to expand and to be more indiscriminately used by federal prosecutors.

Every new case involving more than one defendant is an opportunity to charge a count in conspiracy. The liberal rules of evidence in conspiracy cases permit all sorts of matters to be developed on the trials and to be presented to the juries. These matters are denominated as "preliminary" or "background"; much evidence is tendered "subject to correction"; and endless acts and declarations of others no matter how remotely connected to particular defendants, are introduced as evidence of conspiracy, becoming admissible by charging these others either as co-defendants or merely as "co-conspirators but not as defendants." All this great mass of material is heard by juries who naturally conclude that the particular conspiracy case before them involves diabolical and pernicious scheming and criminal activity, even though in substance it involves the simplest set of facts. The present case is a classic example of this technique. Here the prosecution went very

far afield to lay a foundation that this case involved a long-range conspiracy, when in substance there was only credible proof as to the facts of the final night. Thus this petitioner was ensnared in this "dragnet of conspiracy."

Considering the mass of the evidence ostensibly admitted against petitioner to prove his participation in the conspiracy, no wonder then that after eight days of trial, the jury probably felt and believed that this petitioner must necessarily have been a party to the conspiracy in this case. Justice Jackson described the typical situation in these words:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge on conspiracy which I will not enumerate." (*Krulewitch* v. *United States,* 336 U.S. 440, 454).

That this description fits the facts in this case insofar as this petitioner is concerned is certain; that there was no credible evidence introduced connecting petitioner with the conspiracy in this case is equally certain. Accordingly, the judgment of conviction should be reversed for this reason alone.

II

The Receipt in Evidence of the Post Conspiracy Written Confession of Co-Defendant Whitley Was, Under the Circumstances in This Case, Prejudicial to Petitioner's Rights.

On January 5, 1952, more than a week after all of the defendants in this case were apprehended, defendant James Whitley appeared with his attorney at the offices of the Alcohol & Tobacco Tax Unit and there executed a detailed written confession implicating himself, defendant Margiasso and petitioner in the conspiracy to sell illicit alcohol. This confession, reprinted herein as an Appendix, contains details of alleged criminal conduct by petitioner and effectively completes the picture attempted to be drawn by the prosecution of petitioner's alleged participation in the conspiracy.

During the trial, the Government offered in evidence this written confession (386) and it was received as Government's Exhibit No. 12, over the objection of all defendants, including Whitley (727). In receiving this written confession in evidence, the trial judge admonished the jury that it was being received and was to be considered only as against Whitley (727-737). During his charge to the jury, the trial judge further admonished and instructed the jury that they were to consider the confession only as against Whitley and that it was not to be considered as evidence against any of the other defendants named therein (928-929).

There is no dispute as to the fact that this written confession was made at a time subsequent to the termination of the conspiracy alleged in the indictment; that it forms no part of the conspiracy; and that it was not made in furtherance thereof. There is no dispute that this document contains details of alleged criminal conduct by petitioner

and that it was seen and read by the jury. It is petitioner's argument that the receipt in evidence of this written confession under the circumstances of this case, notwithstanding the trial judge's admonition and instructions to the jury that it was being received and was to be considered only as against Whitley, nevertheless had the effect of being received and being used as evidence against petitioner, thereby violating the rule against inadmissible hearsay set forth in *Krulewitch* v. *United States*, 336 U.S. 440. Petitioner contends that without this written confession before it the jury would have had no evidence connecting him with the conspiracy herein; that notwithstanding the trial judge's admonition and instructions to the contrary, the jury nevertheless used and considered this document in finding petitioner guilty of criminal conspiracy.

The majority of the Court of Appeals held that this written confession was admissible in evidence as an exception to the hearsay rule; and, accordingly, that it was not error to receive it, considering the trial judge's admonition to the jury that it was to be used only in determining the guilt or innocence of Whitley. Judge Learned Hand, writing the Court's opinion, conceded that "we have recognized without reserve that after the end of any concerted action to admit in evidence the declaration of one of several defendants accused of conspiracy is in effect to accept hearsay against all but the declarant." (229 F. 2d 319, 321) To justify this admission of hearsay Judge Medina in his concurring opinion pointed out the trial judge's admonition and cautionary instructions, stating then "Nor am I able to discover any basis for supposing that the jury did not follow his instructions." (229 F. 2d, 319, 322)

Judge Hand relied upon a series of cases in the Second Circuit extending over a twenty-five year period, authoriz-

ing receipt of such evidence,[9] declaring the solution of this problem as "especially a matter for the exercise of discretion by the trial judge." (229 F. 2d, 319, 321) However, Judge Hand candidly noted that the result of receiving these post-conspiracy hearsay declarations in evidence obviously fortifies the "dragnet of conspiracy" theory:

> "Undoubtedly the ability to introduce them adds to the inducement to sweep all those concerned in a venture into one indictment; and possibly it would have been better, had the price of the admissibility of separate declarations, made after the event, been a separate trial of the declarant; for it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition. Possibly it would be extreme to say that nobody can ever so far control his reasoning that he will not in some measure base his conclusion upon a part of the relevant evidence before him, which he has been told to disregard; but at least it is true that relatively few persons have any such power, involving as it does a violence to all our habitual ways of thinking. Hence, although the doctrine is well settled that such declarations are competent, provided the placebo goes along with them, there is no reason why this should be the final measure of protection granted to the defendants other than the declarant. Unhappily, it is extremely difficult to escape the dilemma that must always arise on such occasions, because on the one hand the declaration should remain unimpaired as against the declarant, and yet it must be in some measure mutilated in favor of the others." (229 F. 2d 319, 321)

---

[9] *Nash* v. *United States*, 54 F. 2d 1006; *United States* v. *Gottfried*, 165 F. 2d 360, 367, cert. den. 333 U.S. 860; *United States* v. *Leviton*, 193 F. 2d 848, 855, 856, cert. den. 343 U.S. 946; *United States* v. *Kelinson*, 200 F. 2d 600.

In dissent, Judge Frank called attention to the basic and inherent evil of the situation created by these post-conspiracy hearsay declarations, relying principally upon *Krulewitch* v. *United States*, 336 U. S. 440:

> "There are no differences between Krulewitch and the instant case except that Whitley was a co-defendant of Paoli and that the trial judge admonished the jury not to consider Whitley's confession as proving the guilt of the other defendants, including Paoli. But those differences can have no practical significance. For Judge Hand concedes that, almost, certainly, the cautionary admonition had no effect on the jury, a concession in accord with Mr. Justice Jackson's comment in Krulewitch (336 U. S. at 453): 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practising lawyers know to be an unmitigated fiction. Skidmore v. Baltimore & Ohio R. Co., 167 F. (2d) 54.' It follows, I think, that Krulewitch governs here, and that accordingly the reception of the confession was, as to Paoli, reversible error. Indeed, the harm here exceeded that in Krulewitch: There the objectionable out-of-court statement was oral; here it was typewritten." (229 F. 2d, 319, 323)

To meet the vital issue of the proper administration of federal criminal justice and to devise a solution for this recurrent problem of post-conspiracy hearsay declarations, Judge Frank proposed a rule consistent with protection of the rights of innocent persons charged with conspiracy, without doing violence to the Government's right to present its evidence:

> "In the light of Krulewitch, I think something like the following is the correct rule: When several defend-

ants are on trial for criminal conspiracy, if the government seeks to put in evidence an out-of-court statement by one defendant which is hearsay as to the others (i.e., an out-of-court statement made after the conspiracy has terminated), then

(a) unless all references to the other defendants can be effectively deleted (so that the statement will contain no hint of the others' guilt) and unless those references are deleted,

(b) the trial judge (1) must refuse to admit the statement or (2) sever the trial of those other defendants." (229 F. 2d 319, 324)

Judge Hand's solution for this problem is to allow the trial judge's discretion to govern, "provided the placebo (cautionary instruction) goes along with them."[10] Judge Frank's answer to Judge Hand is that *Krulewitch* destroyed this rule, and that in any event, "in criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to mend." (229 F. 2d 319, 323, and especially footnote 7)

During the trial of this case when the Whitley confession was about to be received in evidence, petitioner's trial counsel requested deletion of petitioner's name and the de-

[10] In a further elaboration of the opinions of the Court of Appeals in this case, Judge Frank in dissenting in the case of *United States* v. *Grunewald*, 233 F. 2d, 556, 574, recited a definition of "placebo" as "a 'medicinal lie' which undermines 'a truly moral relationship between physician and patient' ", comparable to "a kind of 'judicial lie': It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice." Judge Frank also pointed up the psychological effect on jurors of the "cautionary instruction" by repeating Mark Twain's story of the boy told to stand in a corner and not think of a white elephant, which Judge Frank had first related in his dissenting opinion in *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 656.

tails of his purported criminal conduct before the confession was received. The request was denied and thereupon the jury had the document before them in unaltered form. The argument was made that as proper practice excision or deletion of the hearsay should have been directed as a condition of receiving this confession. This argument was repeated before the Court of Appeals, with the Court agreed that such deletion would not have achieved the purpose of the request. Although deletion might not have achieved the desired purpose in this case, it is submitted that the underlying objective of keeping the objectionable hearsay from the jury outweighed any shortcomings which might have been created by the deletion. Of course complete rejection of the hearsay confession would have been the proper ruling by the trial judge.[11]

To demonstrate the harm done to petitioner by the receipt in evidence of the Whitley confession in its original form, one has to consider only that this confession was a written document, and not the oral testimonial statement of a witness relating a conversation had with a co-conspirator or narrating a post-conspiracy declaration. Such oral statements are capable of being kept out of evidence, or it is possible to have a witness relate only those portions of such declarations as are admissible. Objectionable narrated statements can easily be ordered stricken from the record, with the jury directed to disregard them, while written confessions cannot lightly be disregarded by jurors. In the history of our culture written statements have imported so much more deliberation and significance on the part of the writer or author that they are given greater credence and value by their readers. When the jury in this case had Whitley's confession before them, its full

---

[11] See Morgan, *Some Problems of Proof under the Anglo-American System of Litigation* (1956), especially those lectures concerning hearsay, pp. 106-195.

significance in describing petitioner's alleged participation in the conspiracy was fixed in their minds. No amount of oral admonition or instructions could thereafter undo the harm already created. The "mental gymnastic" [12] then truly was beyond their powers.

The Government has argued that the *Krulewitch* rule is inapposite here, for the reason that in *Krulewitch* the defendant stood trial alone with the co-conspirator's declarations inadmissible, while here the confessor stood trial along with co-defendants, and as to the confessor the confession was admissible. Subsuming this argument is an apparent attempt to devitalize the forceful rules laid down in *Krulewitch* by attempting to narrow its application to its factual situation. However, it seems clear that the broad principles of justice enunciated in that case relative to conspiracy trials should not be devitalized in this case.

The Government has also argued that this Court has recognized the propriety of admitting post-conspiracy declarations in multiple defendant conspiracy cases where the "cautionary admonition" has been given. [13] While this is so, nevertheless, the cases supporting this argument have each indicated that the error of receiving the inadmissible hearsay in effect has been "harmless error." [14] In *Lutwak v. United States*, 344 U. S. 604, this Court explained:

> "In the trial of a criminal case for conspiracy, it is inevitable that there shall be, as there was in this case, evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other

---

[12] *Nash* v. *United States*, 54 F. 2d 1006, 1007, (2d Cir., *per* Learned Hand, C.J.)

[13] *Opper* v. *United States*, 348 U.S. 84; *Lutwak* v. *United States*, 344 U.S. 604; *Blumenthal* v. *United States*, 332 U.S. 539.

[14] Rule 52 (a), Federal Rules of Criminal Procedure, Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declarations. These declarations must be carefully limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose. While these difficulties have been pointed out in several cases, e.g. *Krulewitch* v. *United States, supra,* at 453 (concurring opinion); *Blumenthal* v. *United States* 332 U.S. 539, 559-560; *Nash* v. *United States,* 54 F. 2d 1006, 1006-1007, the rule has nonetheless been applied. *Blumenthal* v. *United States, supra; Nash* v. *United States, supra; United States* v. *Gottfried,* 165 F. 2d 360, 367." (344 U.S. 618-619)

Then in applying this rule to the facts of the case before it; this Court observed:

"In our search of this record, we have found only one instance where a declaration made after the conspiracy had ended was admitted against all alleged conspirators, even though not present when the declaration was made. Was the admission of this one item of hearsay evidence sufficient to reverse this case?

"We think not. In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one." (334 U.S. 619-620)

The test then may very well be at what point do you stray beyond the bounds of propriety, beyond the point of

no return, where admonitions and instructions to juries by trial judges are fruitless and incapable of being heeded. It is submitted that in this case, this point was reached and passed. *Kotteakos* v. *United States*, 328 U.S. 750, 764-765.

In considering the evidence of record against this petitioner, it is clear that the error of receiving Whitley's hearsay written confession substantially influenced the jury and that the verdict and judgment against petitioner should not stand.

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (*Kotteakos* v. *United States*, 328 U.S. 750, 765.)

See also *Fiswick* v. *United States*, 329 U.S. 211; *Bihn* v. *United States*, 328 U.S. 633.

The conviction of petitioner Orlando Delli Paoli should be reversed and a judgment of acquittal dismissing the indictment should be entered. *Bryan* v. *United States*, 338 U.S. 552; Rule 29, Federal Rules of Criminal Procedure.

Conclusion

It is therefore respectfully submitted that the judgment of the Court below should be reversed and that judgment of acquittal dismissing the indictment be entered.

DANIEL H. GREENBERG,
Counsel for Petitioner.

August, 1956.

APPENDIX

Government's Exhibit No. 12, Confession of James Whitley

UNITED STATES OF AMERICA,

Southern Judicial District of New York, ss:

JAMES WHITLEY, being duly sworn, deposes and says:

I reside at 65 West 133rd Street, Apartment 4E, New York, N.Y. I make this statement in the presence of my attorney, Mr. Bertram J. Adams of 299 Broadway, New York, N.Y., after being fully advised that under the Constitution of the United States I have the privilege and right of not saying anything at all; that if I answer any question anything I say could be used against me in any criminal proceeding. Being fully aware of my rights, I make this statement of my own free will to Special Investigators Albert Miller and William Greenberg in the office of the Alcohol and Tobacco Tax Division, 143 Liberty Street, New York, N.Y.

Sometime around Thanksgiving of 1949, a friend of mine introduced me to a man known to me as Tony. This man asked me if I wanted to buy some alcohol and I told him I did. The meeting occurred on 126th Street in Harlem. The man then told me to meet him the next day at a candy store on the south side of 119th Street, just east of First Avenue. When I got there, Tony introduced me to a man whose name I do not know. This man told me to meet him that night on 100th Street and Second Avenue. I met him there. He took my car and drove away. A little while later he came back and told me that the car was parked on 103rd Street and Second Avenue. I had purchased two 5-gallon cans of alcohol on that occasion and paid him just before he drove away in my car. Thereafter, I would meet this man around the candy store about twice a week and the same procedure would be followed. This continued until about June or July of 1950.

Tony was about 5' 4" in height, about 55 years of age, had a dark complexion and stocky build and, I believe, had brown eyes. He was apparently of Italian extraction. The other man who sold me the alcohol was apparently also of Italian descent, and he had a dark complexion. He spoke in broken English. He had black hair and was about 27 or 28 years of age and was about 5' 9" in height. (Some time in 1950, Investigator Whited of the Alcohol and Tobacco Tax Division asked me about him and showed me his picture.)

At about that time, this man sent me to Carl. He introduced Carl to me and told me that Carl would take care of me from then on. I would meet Carl on Second Avenue between 121st Street and 122nd Street in a seafood restaurant and would purchase the alcohol from him.

Carl is about 5' 10" in height, has blond hair, blue eyes, light complexion and is about 30 years of age. He is apparently of Italian descent. He is about 160 pounds. Carl would usually come to my home to see me and ask me if I needed anything.

Just before Carl went to jail in 1950, he introduced me to Bobby. I have been shown a photograph bearing ATU 3643 N. Y. dated 12/29/51 of Orlandi Delli Paoli, and I identify it as that of the man known to me as Bobby. This was sometime in the summer of 1951. Bobby would come to my house to see me. If I placed an order with him he would set the date and the time for seven or eight o'clock in the evening when I was to pick up the alcohol. The first time I met him at 138th Street and Bruckner Boulevard, in the Bronx. He took my car and was gone about one-half hour and then returned with the alcohol. The second time I met him on the corner of Bruckner Boulevard and Soundview Avenue. From then on he would alternate the procedure; I would meet him one night on 138th Street and the next time at Soundview Avenue.

About two months ago, I began meeting Bobby at the Shell gasoline station known as the Bronx River Service Station on Bruckner Boulevard just past the bridge crossing over to Bronx River. I would usually leave my car parked on the street near the gas station and meet Bobby outside of the gas station. He told me not to go into the gas station as the attendant might not like it.

About a month ago, Bobby introduced me to another man whose name I do not know. I have been shown a photograph marked ATU 3642 N. Y., dated 12/29/51 of Carmine Margiasso, and identify it as that of the man to whom Bobby introduced me. Bobby also told me that if he was not present when I met Margiasso, I was not to give Margiasso any money but was to pay him (Bobby) the next time I saw him. Margiasso also followed the same procedure: He would take my car, would be gone about 20 minutes, and then return with the alcohol. Margiasso picked up my car about four times.

My purchases from Bobby would consist of two or three 5-gallon cans of alcohol at a time and were made once or twice a week. The last two times I paid Bobby $38 a can.

On the evening of Friday, December 28, 1951, I had ordered two cans, and when Margiasso took my car I waited in the lunch room near the gas station. When I thought it was time for Margiasso to return, I went over to the gas station and waited in the office after purchasing a package of cigarettes. Two officers who were Federal officers came in and placed me and William Hudson under arrest. Shortly after that happened, Bobby drove up and was arrested by the Federal officers.

I have read the above statement consisting of three pages and it is true to the best of my knowledge and belief.

(S). JAMES WHITLEY.

Sworn to before me this 5th day of January 1952.

(S.) WILLIAM GREENBERG, *Spec. Inv.*

Witness:

(S.) ALBERT MILLER, *Spec. Inv.*